IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

SAMUEL A. MILLER, as Trustee in Bankruptcy of the Estate of John Barrymore, Bankrupt,

Petitioner,

vs.

ROLAND RICH WOOLLEY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The District Court did not render an opinion.

The opinion of the Ninth Circuit Court of Appeals appears at page 57 of this brief.

The opinion of the Referee appears at pages 63 to 103 of the Record.

II.

Statement of the Case and the Facts.

This has been covered under headings II and III in the foregoing petition for writ of certiorari. For the sake of brevity the statement is not repeated here, but certain matters of evidence will be averted to under the heading of "Argument."

III.

Specifications of Errors.

The following are assigned as errors in connection with the judgment of the Ninth Circuit Court of Appeals made on March 20, 1944:

(1) Its affirming the judgment of the lower Court by holding that the findings upon which that judgment is based are amply supported by the evidence.

(2) Its finding and holding that the Referee in Bankruptcy was without jurisdiction over the funds received by respondent from the debtor.

(3) Its failure to find that the acts and conduct of the respondent constituted a fraud upon the referee in bankruptcy.

(4) Its holding that the Referee in bankruptcy was without jurisdiction over subsequently acquired property where a plan of arrangement, under Chapter XI, failed and an order of adjudication was entered.

(5) Its failure to hold that a contract made during the pendency of the Chapter XI proceedings without the approval of the Court, between the debtor and the respondent, was void and payments made thereon recoverable by the receiver.

In Proceedings Under Chapter XI a Debtor May Offer to Pay His Earnings to His Creditors, and Such Earnings so Paid Into Court and Undistributed to Creditors Do Not Become the Property of the Debtor Upon His Subsequent Adjudication.

The legal foundation upon which the Circuit Court of Appeals based its decision appears in the two following excerpts from its opinion:

> "If the money paid to the appellee on behalf of the debtor was the debtor's own money to do with as he saw fit, as we believe and hold, the question of whether or not the continuance of the order making the so-called allowance to the debtor resulted from concealment of facts is immaterial, and there is no basis for requiring the repayment to the bankrupt estate of the moneys prepaid to the debtor in the form of an allowance. It was his money both before and after the order. . . .
>
> "The question as to whether the order of allowance in the arrangements proceedings did or could limit the debtor's use of the funds allowed him if doubtful before the adjudication of bankruptcy is set at rest by a retroactive adjudication in bankruptcy which freed his earnings so far as the jurisdiction of the bankruptcy court is concerned from the claim of the bankruptcy court over his property."

The Circuit Court cited as authority Section 378 of the Bankruptcy Act (11 U. S. C. A. 778), to the effect that after the entry of an order of adjudication under Chapter XI, "the proceedings shall be conducted, so far as possible, and in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had

been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed," and *In re Leibowitt,* 93 F. (2d) 333, 335, holding that the wages of a bankrupt after adjudication are not subject to the claims of the bankrupt estate. The Circuit Court also cited Section 341 (11 U. S. C. A. 752), which provides that where not inconsistent with the provisions of Chapter XI, the rights, duties and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same as in a voluntary bankruptcy proceeding.

The Circuit Court's decision that by reason of the fact that upon the failure of or abandonment of a plan of arrangement and the subsequent adjudication of the debtor as a bankrupt, the adjudication relates back to the date of the commencement of the proceeding, and all the funds paid to the Receiver from the earnings of the debtor were then in effect paid after the order of adjudication, and were not subject to the claims of creditors under *In re Leibowitt, supra,* will have a far-reaching effect in this as well as other Chapter XI proceedings. In this matter the effect is that the funds remaining in the hands of the receiver, proceeds of the earnings of the debtor paid into court in accordance with the debtor's plan of arrangement and undistributed to creditors, become the property of the debtor's probate estate.

The Circuit Court's construction of the Bankruptcy Act is clearly erroneous. Chapter XI of the Bankruptcy Act (Sections 301 to 399, inclusive), creates a complete, practical and workable method whereby a debtor may offer his creditors any lawful plan for the payment of his debts. By the acceptance of the debtor's offer, as con-

tained in his plan of arrangement, by his creditors and the confirmation by the court, a contract comes into being by which the parties are bound during its existence. This contract may be terminated by the debtor. (*McKeever v. Local Finance Co.*, 80 F. (2d) 499.) It may be terminated by the Court upon default or its consummation, under Section 377, and if it is an original Chapter XI proceeding, not one filed after the commencement of a bankruptcy proceeding), the Court may either dismiss the proceeding or enter an order of adjudication. But this is a termination of the contract only, and not a rescission voiding the contract from its inception. Such termination does not affect or change the terms of the contract, as a rescission might. It simply ends the proceedings under the contract.

The offer made by the debtor to pay his earnings into Court for the disbursement to his creditors was a legal offer, as will be demonstrated by quoting Article VIII of Chapter XI, entitled "Provisions of arrangement," which is as follows:

> "Sec. 356. An arrangement within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or of some class of them, upon any terms or for any consideration.
>
> Sec. 357. An arrangement within the meaning of this chapter may include . . .
>
> (1) Provision for treatment of unsecured debts on a parity one with the other, or for the division of such debts into classes and the treatment thereof in different ways or upon different terms;

(2) Provisions for the rejection of any executory contract.

(3) Provisions for specific undertakings of the debtor during any period of extension provided for by the arrangement, including provisions for payments on account;

(4) Provisions for the termination, under specific conditions, of any period of extension provided by the arrangement;

(5) Provisions for continuation of the debtor's business with or without supervision or control by a receiver or by a committee of creditors or otherwise;

(6) Provisions for the payment of debts incurred after the filing of the petition and during the pendency of the arrangement;

(7) Provisions for retention of jurisdiction by the Court until provisions of the arrangement, after its confirmation, have been performed; and

(8) Any other appropriate provisions not inconsistent with this chapter."

Clearly, then, there is no basis in the statute for the Circuit Court's holding that because the entry of the order of adjudication reverted back to the date of the filing of the petition, the contract as contained in the plan and its confirmation was rescinded, inoperative from its beginning and completely set aside. Nor is the decision sustained by *In re Leibowitt*, 93 F. (2d) 333, which holds only that in an ordinary bankruptcy proceeding the wages of the bankrupt earned after the adjudication are not subject to the claims of creditors, which has always been the law and without which law bankruptcy proceedings would be of little benefit to the bankrupt. It is true that to keep the debtor's estate *in custodia legis* for the protection of the

creditors, it was necessary to provide that an adjudication entered after the termination of a plan of arrangement should revert back to the date of the filing of the original petition. The existence of that necessity, however, provided no ground for Congress legislating that the termination of a plan of arrangement has the effect of rescinding and completely setting aside the contract between the debtor and his creditors, which is what the plan, its acceptance by the creditors and confirmation by the Court become. And it is clear that Congress did not so legislate.

The Referee Had Jurisdiction to Order Respondent to Repay the Funds Received by Him From the Debtor Out of the Weekly Drawing Account.

A. THE PAYMENT TO DEBTOR WAS MADE AS A RESULT OF A REPRESENTATION THAT THE FUNDS WERE REQUIRED BY DEBTOR FOR LIVING EXPENSES.

B. THE RESPONDENT CONCEALED FROM THE COURT THE FACT THAT THE MONEY THAT WAS REPRESENTED AS BEING USED FOR LIVING EXPENSES WAS BEING ACCEPTED BY HIM AS A FEE.

C. PROPERTY SECURED BY FRAUD OR MISREPRESENTATION FROM THE ESTATE OF A DEBTOR MAY BE RECOVERED IN A SUMMARY PROCEEDING.

We rely upon the case of *Governor Clinton, Inc., v. Knott, et al.*, 129 Fed. (2d) 149 (C. C. A. 2, 1941), to which the Circuit Court's decision in this matter is squarely contrary. That case was one involving a proceeding under Section 77-B of the Bankruptcy Act, where the property of the debtor had been under the control and management of a committee consisting of three persons including the attorney and officers of the debtor. This committee did

not operate the property successfully and the Court ordered the same to be managed by the Knott Management Corporation. This corporation successfully managed the property. However, one-third of the compensation received by the Knott Corporation was secretly paid to the members of said committee consisting, as aforesaid, of two officers and the attorney for the debtor corporation. The successor in interest of the debtor then sought to secure a summary order requiring the above three persons to repay all money received from the Knott Management Corporation. Concerning the power of the Court to order the repayment of such funds in a summary proceeding, the Court, at page 152, said:

> ". . . Summary jurisdiction may be invoked for purposes other than to protect property within actual or constructive possession of the Court. Here a contract was made with the debtor in possession and a fraud worked on this estate through a common conspiracy among the respondents. This amounts to a fraud and imposes on the Court itself, and in such cases the Court undoubtedly has summary jurisdiction to protect itself and the interests of the persons and property within its custody."

It is also interesting to note that in the above case, as in that at issue,

> "Their removal (funds of the estate) from its (the Court's) custody was not by force but by order of the Court itself." (*Ibid.* p. 152.) (Words in parentheses added.)

The *Knott* decision and any other on the subject of summary jurisdiction all have their origin in the opinion of the Supreme Court of the United States in *May v. Hender-*

son, 268 U. S. 111. In that case there was an assignment for benefit of creditors prior to the filing of a petition in bankruptcy. Both before and after the filing of the petition, with knowledge thereof, the assignee paid out certain funds of the bankrupt. The trustees sought to recover all funds so paid, and in holding that the trustee was entitled to recover, the Supreme Court, at page 117, said:

> "The rule is the same when the creditor secures payment of his debt from the bankrupt estate after the filing of the petition. A summary order may be made directing the repayment of money to the trustee in bankruptcy."

In *Matter of Payman,* 40 Fed. (2d) 194, it is said concerning the *May* case:

> "The decision squarely held that a court of bankruptcy has power to compel a person to make restitution who has disposed of the bankruptcy funds with knowledge of the petition."

The general rule here contended for is approved in *Knapp, Spencer Co. v. Drew,* 164 Fed. 413; *In re Skirt Company,* 222 Fed. 256.

It was held in *In re Breinig,* 40 F. Supp. 29, that the Bankruptcy Court had exclusive jurisdiction over the debtor and his property. In that case the Referee assumed jurisdiction over debtor's attorney for services rendered both before and after the filing of the petition and in and outside of the bankruptcy court.

In applying the foregoing principles of law to the facts of the case at bar, it will be necessary to quote extensively from the testimony.

It may be argued that once the debtor received his weekly allowance that he was a free agent to do what he wanted with the money thus received. This, however, is false reasoning. We are dealing in this case with a debtor who offered to pay all his earnings into Court and receive from the Court a reasonable allowance to be used for specific purposes. Among other things in his petition, debtor stated:

> "Your petitioner alleges that a reasonable drawing account pending the further order of this Court as and for his living expenses herein and for his services herein should be and is the sum of One Thousand ($1,000.00) Dollars per week." [Rec. p. 113.]

In his prayer the debtor stated:

> "Wherefore, your petitioner prays that an order be made herein fixing his drawing account for his household expenses and necessities at the sum of $1,000.00 per week, subject to the further order of this court." [Rec. p. 113.]

Thus, at all times the Referee had before him the sworn representation of the debtor that the money that was being paid out by the Receiver was being paid for household expenses and living expenses. Nothing is said about attorney's fees or other expenses.

On November 28, 1940, under the signature of respondent, debtor consented to a voluntary reduction from $1,000.00 per week, and referred specifically in said document to the proceedings of June 5, 1940. [Rec. p. 145.]

It must be borne in mind that respondent in this case is an attorney who appeared in the proceeding as the attorney for the debtor, and he certainly is subject to the

jurisdiction of the Court with regard to his fees for services rendered in a court other than the bankruptcy court.

In re Breinig, 40 F. Supp. 29.

Respondent cannot hide behind the defense of lack of jurisdiction where he actively appeared in the proceeding and by his very own statements concealed from the Referee the fact that he was receiving a portion of the debtor's living expenses.

It will be noted from the record that during the employment of respondent as attorney for debtor, the Referee stopped the weekly allowance for living expenses for the reason that the debtor became unemployed and later restored the allowance for the reason that the debtor again was bringing money into his estate [Rec. p. 126], and in this respect respondent was active in bringing about the restoration of the allowance. [Rec. p. 370.]

The Referee's Findings Are Sustained by the Evidence and the Judge's Findings Are Contrary to the Evidence.

Finding I of the Referee's findings was that on June 5, 1940, an original petition under Chapter XI was filed by the debtor, and that the same was still pending. [Rec. p. 104.] The Referee also found that the agreement for the payment of the $10,000.00 fee in the divorce action was signed on September 20, 1940, three and one-half months after the commencement of the proceedings, at a time when respondent had knowledge of the pendency of the bankruptcy proceedings, and that neither the Referee nor the creditors had knowledge of the making of the agreement until about May 17, 1941, and that the agree-

ment was not approved by the Court. [Rec. p. 106.] The Referee further found:

"X.

That on various occasions between the 26th day of September, 1940, and the 17th day of May, 1941, when the amount of the allowance to the debtor for support and maintenance was under consideration, respondent represented to the court and the creditors of said debtor, that the sums being allowed the debtor by the court for the debtor's support and maintenance were necessary for that purpose, which said representations were untrue, and were made by said respondent with the intent of enabling the debtor to secure sufficient funds from the receiver to permit the payment to respondent by the debtor of large sums on account of said attorney's fee in said divorce action. That between said 26th day of September, 1940, and said 17th day of May, 1941, respondent caused the debtor to pay to the respondent, out of funds which the debtor had earned since the commencement of this proceeding, and which were allowed to the debtor by the court for the debtor's maintenance, the sum of five thousand nine hundred and fifty ($5,950.00) dollars, to apply on attorney's fees claimed by said respondent under said purported agreement of September 20, 1940. That said payments were made on the following dates and in the following amounts:

September 28, 1940	$750.00
October 29, 1940	250.00
November 1, 1940	500.00
November 15, 1940	500.00
November 26, 1940	500.00
December 5, 1940	500.00
December 11, 1940	200.00
January 2, 1941	250.00

January 16, 1941	200.00
January 27, 1941	300.00
February 14, 1941	200.00
March 11, 1941	500.00
March 19, 1941	500.00
April 5, 1941	300.00
May 2, 1941	500.00
Total	$5,950.00

That neither the court nor the creditors of the debtor, prior to about the 17th day of May, 1941, had knowledge of the payment of said sum of five thousand nine hundred and fifty ($5,950.00) dollars by the debtor to the respondent. That if the court had had knowledge of the making of said payments by the debtor to the respondent the amount of the allowance to the debtor for his living expenses would have been reduced and the court would not have permitted any payments to be made by the debtor to respondent to apply upon the said purported agreement of September 26, 1940." [Rec. pp. 107-108.]

From the findings the Referee then drew conclusions of law that the agreement for the payment of the $10,000.00 divorce fee was void, by reason of the fact that it was made while the proceedings were pending and not approved by the Court; that the orders for the payment of the allowance to the debtor were made, and requests of the creditors that the amount of the allowance be reduced were denied by the Court in reliance upon the representations of respondent and his associates that such amounts were necessary for the maintenance of the debtor, which were untrue, and ordered the $5,950.00 paid to the Receiver. [Rec. pp. 110-111.]

The findings of the District Judge, reversing the order of the Referee, cover pages 335 to 357 of the Record. Digging the meat out of these verbose findings it appears that the District Judge based his reversal on the following grounds:

That it is not true that the sums paid the debtor were only for living expenses; that the orders for the payment of the allowance did not limit nor restrict its use. [Last par. Finding III, Rec. p. 344.] The first statement is clearly refuted by the debtor's petition and order of the Referee appearing on pages 112, 113 and 114. Whether or not the order for the payment to the debtor of his allowance restricted its use was not an issue. The Referee found that but for the fraudulent representations and concealment of respondent the allowance would have been reduced so that no money would have been available for payment to respondent.

That the divorce fee agreement did not concern the arrangement proceedings or the assets of the debtor owned at the time of its commencement; that it was neither necessary nor required of respondent that he reveal the existence of the divorce fee contract nor the payments thereunder to the Court or creditors. [First par. Finding VII, Rec. p. 47.]

That the pendency of the divorce proceedings, and the fact that respondent was rendering "extensive legal services" therein, were discussed in Court on October 9, 1940; November 6, 1940; November 7, 1940; March 18, 1941, and April 21, 1941; that the Referee and creditors knew that all the debtor's assets were in the custody of the bankruptcy court; that all sums earned by him since the commencement of the proceedings had been paid to the Receiver. [Rec. p. 348.]

Then follows a finding that is really a legal gem, which we desire to quote:

> "The court further finds that the said referee in bankruptcy and the creditors knew as early as October 9, 1940, that an agreement existed between Roland Rich Woolley and the debtor for the debtor's legal representation by Roland Rich Woolley in the divorce matter, and knew or should have known, that said Roland Rich Woolley was being paid, or would be paid, compensation for said services from sums received by John Barrymore as an allowance herein." [Rec. p. 348.]

Back in Finding VII [Rec. p. 347] the District Judge found that the divorce fee agreement was neither submitted to nor approved by the Referee because it was none of his business. Now respondent concedes that the Referee and the creditors were entitled to know of the existence of the agreement and the making of the payments thereunder, because they were put upon notice and should have known. In other words the Court cannot accept the statement of the attorney for the debtor as true but is put on notice and must investigate any facts tending to indicate its falsity.

Continuing with the District Judge's findings:

That the orders which the Referee states he made in reliance upon respondent's representations that the same were necessary for the debtor's maintenance were not so made, because the first order was made prior to the respondent's becoming the debtor's attorney, and was continued in effect, with two trivial modifications, during the respondent's entire representation of the debtor. [Finding VIII, Rec. p. 349.]

Thus is ignored the fact that the Referee found, as previously quoted, that, in effect, the amount of the allowance was continued despite constant demands for its reduction by reason of his reliance upon respondent's representations as to its necessity.

The District Judge then finds that during the time the respondent was the attorney for the debtor neither the Referee nor the Receiver "ever sought, requested or demanded" an accounting of the money paid over to the debtor. [Rec. p. 350.] As to what the Referee and creditors were endeavoring to learn from the many inquiries which they directed to respondent at the various hearings, which we will hereafter quote, and which respondent skillfully parried, this Court will be the best judge. The foregoing finding is then followed by a finding that the allowance to the debtor was not made or continued upon any representations by the respondent, "but was made and predicated upon John Barrymore continuing voluntarily to pay into court all his personal earnings as an actor in excess of sums which he sought to withdraw, and upon such earnings so paid being in excess of amounts paid to him pursuant to said orders for an allowance." Respondent must have considered the situation desperate to request such a finding from the District Judge in view of the fact that debtor was not being hired. He had no alternative. With many non-dischargeable debts he required the Court's protection to permit him to draw any part of his salary, or his creditors would have taken it all. He was coming to the Court hat in hand and asking a favor; not as a temperamental employee dictating the conditions upon which he would work. In his original petition for an allowance [Rec. pp. 112-113], he alleges that he had previously expended $1,000.00 per week "as and for his household and necessary expenses"; that a reasonable drawing

account "as and for his living expenses herein and for his services herein" should be and is the sum of $1,000.00 per week, and prays that an order be made "fixing his drawing account for his household expenses and necessities at the sum of $1,000.00 per week." Effort is made to place great weight on the words "and for his services herein." We know of no other place in the record where this or any similar expression is used, and in all the various statements made by respondent attempting to justify the allowance to the debtor and prevent it being reduced, there is never any statement to the effect that the debtor was an employee entitled to $1,000.00 a week for his services, which would have been ridiculous in view of the fact that he was often earning $5,000.00 a week and more.

Continuing with the District Judge's findings, we find that finding was next made that it is not true that respondent concealed from the Referee the fact that $5,950.00, or any sum, was paid as attorney's fee in the divorce matter. We assume this finding to be a delicate shading of the meaning of the word "conceal," because in Finding VII [Rec. p. 347] the Judge found that the divorce fee agreement was not submitted to nor approved by the Referee, nor was the Referee informed of the terms thereof, nor of the payments thereon. The Judge then finds that respondent did not state the amount of the fee because he believed that the debtor was entitled to use his drawing account for any purpose he saw fit and that the Referee knew that respondent was receiving compensation for his services in the divorce action, and that "the referee was not concerned with nor interested in the amount of payment thereof, provided it was paid from said allowance or drawing account." Or, in other words, the transaction was clean and there was no reason for concealment. We ask this Court to judge, from the respondent's own words,

which we will hereafter quote, whether he was desirous of revealing all the facts, and whether he was discussing a proper transaction, or whether he intended to conceal the facts and mislead the Referee and creditors.

The first of many occasions wherein representations were made to the Referee concerning the necessity of the allowance for the maintenance of the debtor occurred on November 6, 1940. One of the respondent's associates, Mr. Casey, referring to the debtor, said:

> ". . . inasmuch as it is necessary for him to have it to maintain himself. . . . He has to live and he has to maintain himself and the expenses that he meets in his work and he just cannot do the impossible." [Rec. pp. 373-374.]

On January 31, 1941, at a hearing where the details of the proposed plan of arrangement were discussed, the following occurred:

> "Mr. Durst (a creditor): I think the allowance should be cut down now. Three hundred should be set aside as a reserve and he be only paid six hundred a week now. (Words in parentheses added.)
>
> Mr. Rank (an associate of respondent): We don't agree to that, and there shows the lack of cooperativeness on Mr. Durst's part, to raise that question. We have been trying to get the plan through and we are not going to be committed to any such amount because we do not think that it is a fair amount. Mr. Barrymore is only willing to do it because of the hope he has in working it out. (Words in parentheses added.)
>
> Mr. Casey (an associate of respondent): We are in a very critical position with Mr. Barrymore to go before him and say 'You are reduced to $600.00 a week' as it will take it right out of him. I know

when I am expecting $100 and get only $50 I have really spent it all. We have a problem here to get him to agree to a few things and sometimes you cannot do that. I don't think we should put something in his way that will make him hostile or mad. (Words in parentheses added.)

Mr. Woolley: When my office took his case over everybody knows he was a physical wreck. We have been making a great effort to get his health and physical condition built up. It has taken a lot of time and he has been living in a place stripped of everything, not a decent bed to sleep on, with not a rug on the floor, by reason of the treatment he had received from the people he was living with at the time, and we have been trying to get the man surrounded with circumstances and environment that will build up his morale. It has taken money to do that. You cannot kill the goose that is laying the golden egg, and any attempt to do it at this time is leaning toward that very end." [Rec. pp. 416-417.]

Up to that time respondent had received $3,950.00 to apply on the $10,000.00 divorce fee, and he might well have very truthfully mentioned to the Court and creditors, if he did not have anything to conceal, that he had received this amount and desired the allowance to the debtor maintained at its high figure in order, among other things, to permit him to receive still further sums on the divorce fee.

On March 11, 1941, respondent paid himself another $500.00 out of his trust account wherein he deposited the Receiver's checks to the debtor under the debtor's power of attorney which he had secured, which made a total of $4,650.00 which he had then received to apply on the $10,000.00 fee. Then a week later, on March 18, 1941,

a hearing was had during which, as so frequently occurred, the necessity for such a large allowance was again raised, and the following statements were made:

> "The Referee: . . . Now, there are two items the court does not approve of in this plan: One is the fact that Mr. Barrymore gets $600.00 a week and his attorneys $100.00 a week. There are two items that a very substantial reduction can be made on. If Mr. Barrymore has to have attorneys after this plan is approved he will have to pay for them out of his own allowance. If Mr. Barrymore is given $600.00 a week he should be able to pay his own counsel without that additional expense. Now, I know it will be argued Mr. Barrymore cannot get along on less. He may have to get along on a whole lot less. People can get along on less when they have no way of getting it. . . ." [Rec. pp. 457-458.]

The effect of the foregoing statement by the Referee was that he would not allow an additional $100.00 a week over and above the $600 per week allowance for the debtor's maintenance. Imagine the shock to the Referee if he had learned that in less than six months the respondent had received $4650.00 out of the debtor's allowance, to apply on the $10,000.00 fee.

At this same hearing the following further discussion was had:

> "Mr. Wix (attorney for a creditor): I have not agreed with many things in this proceeding, but I do agree with the thought that Mr. Barrymore should make an accounting, and there should be some finding here or some information before this court indicating whether he needs $600 a week. I don't think he does. He doesn't pay anything for rent, and I don't think

any person who has $110,000 of obligations outstanding has a right to be living on $600 a week, and I think that is the thing that is really wrong with the plan. They are trying to take out too much, which is indicated by the fact of how much the receiver has on hand. It has been in here ten months and there is apparently nothing left in the hands of the receiver to pay the taxes, apparently, for that period. In other words, when you pay Mr. Barrymore what he wants and if you paid the government its current taxes there would be nothing left to pay on the back taxes. That plan of arrangement is a plan whereby the debtor can come in and hold his creditors at bay forever. The order from this court prohibited us from proceeding with the case we had filed, enforcing our lien against the security, and while we have been sitting here he has been drawing $600.00 a week. (Words in parentheses added.)

Mr. Casey: $1000.00 a week.

Mr. Wix: Yes, and then $900 a week and then $600 a week. Now then, there is only one office of the United States Government who draws more money than Mr. Barrymore and that is the President. Then they give you the talk he cannot live on less. He will have to live on less in the future, and he probably has in the past. Mr. Hotchener, who was with Mr. Barrymore for ten or twelve years, can verify the fact his needs are not excessive. In other words, he does not entertain much, he does not have to. Why does he get contracts for pictures? Because he entertains some producer? No. Because John Barrymore stands for something in the theatre, because the name 'Barrymore,' before him, stood for something. He has that drawing power for that reason. He doesn't have to pay for publicity and propaganda. If he does,

let them come in and show it. When we were trying to find out some of his expenses, as far as we got he could not begin to itemize his expenses—

Mr. Casey: That is a misstatement of the record.

Mr. Wix: I don't remember the record, but his testimony was so vague anybody could be forgiven for not remembering what he did say. If there is any question about it let them come in and account for how they use that money. I don't think he should have a dime over a thousand dollars a month. If he cannot live on a thousand dollars a month, it is just too bad whether he will or not. They have always held the threat over us he is temperamental and cannot do that. I am getting tired of his threats."[Rec. pp. 462-463.]

. . . . . .

"Mr. Casey: I have read Section 307. Mr. Wix has expressed it as though we were pitching the money out of the estate. This money is not in the estate. We are not sacrificing any property of the estate when we pay Mr. Barrymore $600 a week. If Mr. Wix wants to drive a Ford that makes 30 miles to the gallon that's one thing, but if you want to operate a Cadillac that's another matter. If a man earns $200,000 a year and gets only $12,000 for himself, why should he earn that?

Mr. Wix: Well, because he has creditors.

Mr. Casey: When you get as old as Mr. Barrymore or myself are you going to hit problems in life that are going to take that incentive away. Any man that exercises his talent and earns $200,000 a year must have some compensation, present compensation, and if you are going to try to make Mr. Barrymore live like you or I or Mr. Wix does he is not going to earn $200,000 a year. I am speaking seriously. If

we make $500.00 a month and the alimony court says 'you pay $450 a month to your wife,' are we going to continue to earn $500 a month? No, we are not. You ask that he make an accounting for what he made the last ten months. If the County is not satisfied you are not earning $500 a month and orders you to pay it, you will pay it out of what? What does it cost Mr. Barrymore to live? I will ask any attorney who makes ten or twelve or fifteen thousand a year, what do you do with your thousand dollars a month? We have office expenses and haven't you your income taxes, and when you get home how much is left for your family so that your family can go to the neighborhood picture show or to the opera? $600 is the least that Mr. Barrymore can get along on on his own standard of living.

The Referee: What would he spend $600 a week for?

Mr. Casey: I could start in on a few of the items I have figurered out, and I have not talked to Mr. Barrymore about it. He has four employees—five employees.

The Referee: What are they?

Mr. Casey: He has a gardener and chauffeur, he has his house-boy and then he has a gentleman that goes around with him. They get a hundred and twenty to a hundred and fifty dollars a month.

(Laughter in the court room.)

Mr. Casey: What is the idea of the hilarity? It is a serious problem, Your Honor.

The Referee: That all might be very fine if a fellow was not in bankruptcy.

Mr. Casey: If we were asking this money to be allowed out of the present assets—

The Referee: He does not pay them any $600 a week. He does not average paying them $25 a week.

Mr. Casey: Yes, Your Honor.

The Referee: He pays them all how much?

Mr. Casey: They get about $35 a week, at least two of them. The gardner gets $25 a week. These are my figures. I am not positive, and I don't think really these details are of any concern to the creditors, particularly the secured or unsecured to be paid out of future earnings. I estimate about $500 a week that he has to spend that he personally does not get any pleasure out of.

The Referee: How much?

Mr. Casey: $500 a week.

The Referee: I don't know what it would be for.

Mr. Casey: He has his automobile maintenance and his personal spending money.

The Referee: He wouldn't be working and using an automobile an awful lot of the time.

Mr. Casey: He has to use it and the maintenance of it costs money.

The Referee: After all there is only seven days in a week.

Mr. Casey: The maintenance runs him $15 to $20 a week.

The Referee: What is he going to do with $100 a day?

Mr. Casey: Maintain his house expense, his general utilities, telephone—

Mr. Woolley: Pardon my interruption. Mr. Barrymore is living at the large place out on Tower Road. He makes a payment of $90 a week to Elaine Barrymore under the property settlement.

The Referee: That would leave him five hundnred and ten.

Mr. Casey: And the salary to his domestic employees.

Mr. Woolley: Which is approximately $125 a week. There is a very large place there to take care of.

The Referee: That leaves $385.

Mr. Casey: And groceries and meats.

Mr. Woolley: House expenses approximately $80 to $100 a week.

The Referee: What?

Mr. Woolley: From eighty to a hundred dollars a week.

Mr. Durst: That is reasonable, Your Honor.

The Referee: A week?

Mr. Durst: Yes, with Mr. Barrymore's standard of living.

The Referee: I don't think he can eat any more than I can.

Mr. Woolley: You asked for it, Your Honor, and I am trying to give it to you.

The Referee: I am asking for it, and I think that figure is entirely out of reason for a man who has as much bills as he has.

Mr. Woolley: Public utilities at the large place he lives in $20 a week, a telephone bill of from $15 to $20. The place has been badly run down. The lawns were in very bad shape. There was no furniture at all in the house when he moved back there in September, there was a bed and one or two chairs is all and he has been trying to furnish a few rooms and make them livable and suitable and accessible to him and that has been taking some money. There has

been considerable money paid to decorators and for furniture and the like. There is automobile payments, repair of the grounds, getting the lawns in shape, cleaning and miscellaneous expenses, all of which would total over $500 a week. Now, that does not take into consideration any extra expenses.

The Referee: Are we concerned in fixing Mr. Barrymore a nice place to live in, or are we concerned in paying the debts off?

Mr. Woolley: We are concerned in paying the debts off but as I said before you cannot kill the goose that is going to lay the golden egg. Mr. Barrymore is accustomed to a high standard of living. His expenses now are cut down. His help around him understand the situation and are struggling with him and they are diligently struggling to cooperate with him.

The Referee: I am not going to approve a plan that is not workable. I have too many of those in my office right now. I would say at least ten out of every twelve are not working as they should.

Mr. Woolley: May I say further this plan is the result of conferences over an extended period of time with Mr. Durst, Mr. Schaumer, Mr. Black and Mr. Fred Sturdy and others, and several of these men know Mr. Barrymore, they know his standards, know his method of living, know his temperament and out of the discussions have spent a great deal of time and effort to avail themselves of this plan which has finally—

The Referee: Mr. Barrymore's temperament has got to fit the court's temperament here. I am not concerned with his temperament.

Mr. Woolley: You have to, if I may respectfully say so, within reason. Mr. Barrymore wants to fit

the wishes and temperament of the court but at the same time we must frankly recognize human shortcomings.

The Referee: I am not trying to fit my temperment to his. He has to fit mine.

Mr. Woolley: That is true, but at the same time if you are going to take the heart out of a man and not give him a few comforts—

The Referee: Here is the situation. The Court or none of the parties present are responsible for Mr. Barrymore's predicament. It is his own mess he created himself.

Mr. Woolley: His own mess, granted.

The Referee: There is one way to get out of it, and that is to stop the manner of living that brought him into it. If he cannot fit himself into that picture the sooner the Court finds it out the better we will all be off.

Mr. Woolley: At the same time you cannot sit down and arbitrarily rule, in my humble opinion, and say, this is the way it is going to be, without taking into consideration the type of man you are dealing with. If you are going to kill his morale and take his spirits away from him—and the man was depleted in health and had no ambition by reason of his poor health—you will undo all we have been doing in taking time to rehabilitate him, and sort of rebuild the man. The last few months since I have been in contact with him a doctor has been constantly in touch with him for at least two or three times a week, building him up, giving him vitamins and things he needed. His system was depleted. He is an entirely different man today from what I saw in September. I have done nothing really in addition to the legal and financial end of preserving and trying to

direct the situation of his domestic domicile and the kind of people surround him and his habits so he could rehabilitate himself, but when Mr. Wix, with a secured claim, comes in, with all due respect to him, with a $2700 lien and wants to strike at him he is doing so in spite of the wisdom and opinion of the various men we have struggled with over the plan for the past several months." [Rec. pp. 462 to 471, incl.]

. . . . . .

"Mr. Woolley: In discussing his manner of living, Your Honor, please, I personally think it is an improper thing for him to live in that large house and I have talked to him by the hour in regard to the advisability of it but his heart is so set on living there that if you take him away and put him somewhere else he will go to pieces. In view of the fact he is so determined he just goes into a rage if you discuss anything else in regard to his living, but if he lives any place else his living expenses could be reduced considerably.

The Referee: If some creditors step in and take the place away he probably would not live in it.

Mr. Woolley: We may then have nothing to discuss. If a fellow goes to pieces and he does not work—

The Referee: The Court is not here trying to put a fellow together that cannot stay together himself. We are not engaged in that kind of work. A man coming in here and asking equitable relief is supposed to do equity and the Court is not going to try to satisfy Mr. Barrymore's temperament, especially when it costs creditors money.

Mr. Woolley: I think Your Honor has been very considerate and human in taking those things into

consideration in the past, and I think it is Your Honor's duty to do so, but not to go beyond the bounds of reason.

The Referee: I appreciate this, that Mr. Barrymore needs more money to live on than the average person, but an $80 grocery bill per week is absolutely ridiculous.

Mr. Woolley: Frankly, you let Mr. Barrymore go out for his entertainment and he goes into Earl Carroll's place and other places like that, and you have bills piling up which are prohibitive, but if you keep him at home you will find—and we have been trying to persuade him to do so—he brings friends to his home and he takes better care of his health there.

The Referee: Do you realize that is an average of about four dollars a meal?

Mr. Woolley: Well, when there are a lot of people around—

The Referee: That is a lot of money to pay for your meals when you owe creditors $100,000."

In our opinion, it would be difficult to conceive of a more studied effort to conceal and deceive. In the face of statements by respondent like the foregoing, and others which we will hereafter quote, what evidence is there upon which to base the District Judge's finding that respondent was not guilty of concealment of facts and false statements. Up to the date the foregoing statements were made respondent had collected $4650 to apply on the $10,000.00 fee, of which $500.00 had been collected within a week. What statement would the Court have a right to expect from a member of the bar, an attorney for one of the parties to the proceeding—if not at the first time

the amount of the debtor's allowance was questioned, then certainly after the foregoing discussion, particularly if the facts were as found by the District Judge? Something to this effect:

> "Your Honor, we do not desire either the Court or the creditors to be misled. We have an agreement with the debtor to represent him in a divorce action, for which he has agreed to pay us a fee of $10,000.00. We did not submit the agreement with the debtor to the Court nor the creditors for their approval, because we believe it is a matter with which they are not concerned. It is a perfectly legal agreement and we stand on it. The allowance to the debtor is based upon the amount of his earnings, and we do not concede that we are required to justify it or be questioned about it. The money belongs to the debtor to disburse as he sees fit, and in accordance with our belief in the correctness of that position, we have caused the debtor to pay us, and we have paid ourselves out of the trust account into which his allowance from the Receiver is deposited under his power of attorney, the sum of $4650.00 to date, and expect to continue to pay ourselves any surplus that may remain in the trust account, until we have received the full fee of $10,000.00."

What did respondent have in mind when he stated to the Referee:

> "You asked for it, Your Honor, and I am trying to give it to you."

The day following the session at which the foregoing discussion occurred respondent paid himself another $500.00, and then approximately two weeks later, on April 5, 1941, another $300.00, and then at the hearing on

April 21, 1941, when the same subject was again under discussion said:

> "Mr. Woolley: I think Your Honor can take judicial notice of the fact, and everyone in this room knows of the extreme delicacy of Mr. Barrymore's health, and by reason of that fact it takes practically twice the expense to maintain him and twice as many people around him to properly look after him and take care of his wants. Mr. Rank has mentioned the constant medical attention, something he is receiving now and which I am advised he has never submitted to before, but he has submitted to it and is following the instructions to a remarkable degree because he has the incentive to work himself out of this dilemma, but he has been criticizing me and my office because of the fact that he has not been receiving more. He feels he is not being treated fairly. We have told him it is his problem and he must be willing to restrain himself but he feels he has been unduly restrained. I am just telling Your Honor the repercussions we are meeting with and the severe criticism from persons trying to upset the efforts being made, and there have been people going to Mr. Barrymore and telling him that we have been failing in our efforts toward him and that he should receive more. This is the problem in mind in taking care of the various expenses Mr. Rank has enumerated. We assure you when you figure the help he has around him and the demands on him and what he is receiving now he feels very much abused." [Rec. pp. 505-506.]

We would be remiss in not commenting on this statement of respondent. Its implications are far-reaching. He wanted the Referee to believe that the creditors were getting off cheap in paying debtor $900.00 a week for

his living expenses; that debtor was complaining he should have more. Certainly, debtor must have been complaining because respondent's "average take" out of the weekly living expense allowance was roughly $200.00. Wouldn't this have been another occasion for respondent to have made a frank disclosure of what he was doing? Isn't the inference inescapable that respondent didn't want the Referee, and creditors to know that he was using the household allowance as a reservoir to collect fees? Isn't it apparent that by his every statement he wanted it known that Barrymore desperately needed every dollar for living expenses?

We feel that the foregoing statements made in open court by respondent constituted a fraud upon the Court and justified the Referee in making the order complained of. We further feel that had a disclosure been made to the Referee concerning the payments received by respondent, the weekly allowance for living expenses would not have been continued.

It is our view that the findings of the referee to the effect:

> "That neither the Court nor the creditors of the debtor, prior to about the 17th day of May, 1941, had knowledge of the payment of said sum of $5,950.00 by the debtor to the respondent. That if the Court had had knowledge of the making of said payments by the debtor to the respondent the amount of the allowance to the debtor for his living expenses would have been reduced and the Court would not have permitted any payments to be made by the debtor to respondent to apply upon the said purported agreement of September 26, 1940." [Rec. p. 108.]

are amply supported by the evidence in that the evidence permits of but one conclusion.

We respectfully submit the finding of the District Court to the effect that:

> "Said sums received by Roland Rich Woolley, as aforesaid, were the sole and unrestricted property of John Barrymore, paid to him without restriction or limitation." [Rec. p. 346.]

finds no support in the record. It is our view that on review the District Court cannot draw unnatural and unreasonable inferences from the evidence, and where but a single inference may be drawn from the evidence, the District Court is bound to follow that inference.

The Order of the Referee Was Based Upon Substantial Evidence and the Referee Was in a Better Position to Judge the Credibility of the Witnesses Than the District Court.

The general rule of law seems to be that findings of fact by the referee are conclusive unless clearly erroneous.

In re Dant & Dant, 39 Fed. Supp. 753;

Kessler v. Jefferson Syrup Corp., 125 Fed. (2d) 108.

The Circuit Court of Appeals for the Ninth Circuit definitely decided in *Weisstein v. Laughran,* 84 Fed. (2d) 419:

> "Appellee contends that the case having been tried before the Referee, and the Referee having found that the claimant was entitled to the possession of the canned fruit, that the District Judge could not upon the familiar rule that where facts are litigated before

the Referee and where the witnesses appeared before him and a decision upon the controverted facts has been made by him, the Court will not ordinarily be justified in reversing the findings of the referee as to controverted facts . . ."

In addition to the above cited case, the following decisions of this Court are all in favor of the petitioner's position:

In re Eastern Oil Company, 100 Fed. (2d) 341;
Carr v. Southern Pacific Co., 128 Fed. (2d) 764.

See also:

Newman v. Burnham, 126 Fed. (2d) 336.

It is our contention that if there was a conflict in testimony, the District Judge was bound by the Referee's finding, and if there was no conflict therein, the evidence was susceptible of but a single inference.

To logically pursue the second alternative first and assume no conflict existed in the evidence, it is our view that the following facts were presented:

A. The representation of debtor and respondent that the weekly allowance was for living expenses. [Rec. p. 113.]

B. The repeated statements to the Court by respondent of the necessity of maintaining a proper scale of living for debtor. [Rec. p. 417.]

C. The attempt by respondent to account to the Referee how the weekly allowance was being used. [Rec. p. 473.]

D. The fact that respondent was paying himself an attorney's fee out of the weekly allowance at the very time he was accounting for the use of the money but refrained from advising the Court that he was receiving funds from the weekly allowance. [Rec. pp. 345-6, 468, 469, 470.]

E. The finding of the Referee that the weekly allowance would have been cut had he knowledge of the fact that respondent was receiving substantial sums of money out of the same.

We readily admit that if this evidence is susceptible of two reasonable, but different, inferences, that the District Judge was in as good a position of drawing an inference as the Referee. However, if we were to postulate that all men are mortal and Socrates was a man, could we say that there could be drawn two equally reasonable inferences or conclusions from the foregoing major and minor premises? The answer, of course, is no. It is inconceivable how a reasonable mind could fine innocence, candor, and good faith in the record so far as respondent was concerned.

He was active in having the weekly allowance restored. [Rec. p. 378.] He was active in having it maintained. [Rec. p. 417.] He attempted to itemize its need, use, and disbursement. [Rec. p. 468.] He maintained silence when he should have spoken [Rec. p. 470], and he was putting money in his own pocket. [Rec. pp. 345-6.] His words ring in our ears:

> "You asked for it, Your Honor, and I am trying to give it to you." [Rec. p. 469.]

It would be sophistry on our part to cite authorities to this Court to the effect that the District Judge cannot substitute findings new and different from those of the Referee where the inference drawn by the District Judge is unreasonable, illogical, capricious and abusive of sound judicial discretion.

Respondent's intent and point of view is revealed by his own sworn testimony on August 1, 1941:

> "The Referee: I would like to ask you this question, Mr. Woolley: During the various proceedings had in the Barrymore matter numerous creditors or their representatives asked on numerous occasions that you furnish the Court with an itemized statement of the disbursements of the money allowed to Mr. Barrymore. Has that yet been filed in the case? A. No, it was never filed. It was never ordered by Your Honor.
>
> The Referee: I did not exactly order it. I suggested it. I did not think an order would be necessary. A. I don't recall Your Honor suggested it. I further heard Your Honor say on more than one occasion with regard to the funds turned over to Mr. Barrymore that that was not accountable to this Court, that that was a personal matter with him.
>
> The Referee: That is in a way true, but on what Mr. Barrymore did with his money would depend a great deal, in the mind of the Court, as to what the Court might allow him. It was recommended to the Court at the time these allowances were made that Mr. Barrymore needed this money for his support and maintenance, and it was on that theory, on that representation the Court allowed the amount he did allow. A. I was not in the case at the time the first order was made, and subsequently it was reduced from a

thousand to nine hundred, and when the arrangement was made in the first instance I was not in the case." [Rec. pp. 536-537.]

Again, on August 1, 1941, respondent testified:

"Q. Who eventually got the divorce? A. Well, we filed a complaint and then she filed a cross-complaint and negotiations were taken up with her counsel, Mr.—counsel didn't appear for a while and an application was made for fees, and then Mr. Giesler's office came into it, and extended negotiations were had with Mr. Giesler's office and Mr. Willner and then after the property settlement was finally entered into, as Your Honor will recall, I appeared here and mentioned that to Your Honor and Your Honor made a special order and allowed $2500 to be paid over to her in connection with that settlement, and so then after the settlement was allowed, as a matter of, I would say gentility, Mr. Barrymore allowed her to get the divorce." [Rec. p. 581.]

Yet, what actually happened in relation to the $2,500.00 was:

"The Referee: But the present Mrs. Barrymore, as I stated yesterday, has no standing in this Court. She is not a creditor. The Court is not considering her in any respect in determining the issue in this matter." [Rec. p. 385.]

On the reopening of the matter at the request of the Receiver [Rec. p. 671], he testified that after respondent stepped out of the case and the Referee had ordered him (the Receiver) to pay the personal bills of the debtor, that he received from respondent a number of unpaid bills that he subsequently paid out of the weekly allowance.

These bills are set out in the record. [Rec. pp. 703 and 739.] The reasonable inference to be drawn from this evidence is that debtor's bills could and would have been paid had not respondent used the money to pay himself a fee.

To counter this evidence and the inference resulting therefrom, respondent called as his witnesses his bookkeeper [Rec. p. 681] and a former housekeeper, secretary and employee of the debtor. [Rec. p. 753.] Without detailing all this testimony, it is clear that at least certain of the bills were in respondent's possession and could have been paid by him had he chosen to so do. [Rec. pp. 685-6.]

This merely served to create a conflict in the evidence from which the Referee found:

> "That the notice of motion of substitution of Gordon W. Levoy and Earl E. Moss for and in the place and stead of Roland Rich Woolley and Hiram E. Casey, as attorneys for the debtor in this matter, was served on said respondent on or about May 11th. That on or before January 15, 1941, said respondent had received a statement from Dr. Hugo M. Kersten showing a balance due for services to the debtor of the sum of $227.00, and on or about January 15, 1941, said respondent paid out of the debtor's funds on account of said amount due said Dr. Hugo M. Kersten the sum of $100.00. That between January 15, 1941, the date that Earl E. Moss and Gordon W. Levoy were substituted as attorneys for the debtor in the place and stead of respondent, respondent caused to be paid to himself to apply upon the fee in said divorce proceeding the sum of $2500.00, a small part of which would have been sufficient to pay the

balance due said Dr. Hugo M. Kersten. That sometime during the month of March, 1941, respondent, as attorney for said debtor, received a statement from one A. Vic. Durando for the sum of $260.00 on which respondent paid in March—$60.00, on April 8th —$25.00, on April 16—$10.00, April 24th—$10.00, and on May 3rd—$10.00, leaving a balance due of $145.00. That from March 11th to May 2nd, respondent caused the said debtor to pay respondent to apply upon said fee in said divorce proceeding the sum of $1800.00, and said bill due said A. Vic. Durando could have been paid out of the funds allowed the debtor for his maintenance." [Rec. pp. 109-110.]

We submit that whether one takes the view that the evidence was without conflict or adopts the position that there was a conflict, that as a matter of law, the findings of the Referee should be adopted. It makes little difference in our opinion for the reason that any fair and reasonable view of the record as a whole inescapably shows that the Court was imposed upon and the respondent used concealment and falsehood to obtain $5950.00. As indicated in our argument on the jurisdictional phase of this case, fraud on the Court is a basis of recovery in a summary proceeding. Fair minds cannot disagree on the proposition that the respondent deceived the Referee and benefitted personally from that deception and depleted the estate because the funds which were not used for debtor's living expenses were used to pay taxes and discharge the liens of creditors. [Rec. p. 201.]

In concluding our discussion of this point, we desire to direct the Court's attention to its right to exercise as wide a latitude in reviewing the Referee's findings as the District Judge.

> *The Morris Plan Industrial Bank v. Henderson,* 131 Fed. (2d) 975.

Under the authority of this case and those cited in the opinion, it is our view that this Court may sit in the same position as the District Judge in reviewing the findings of the Referee. In the cited case, at page 977, the Court speaking through Mr. Justice Learned Hand, said:

> "So far, therefore, as the words themselves leave any latitude, the Referee's conclusion ought to prevail because we cannot appraise the cogency of lost evidence. In the end, as we have often said, the responsibility for the right conclusion remains the Judge's, as indeed, it is ours . . . but we have again and again held that except in plain cases he should accept the referee's findings . . . We, therefore, hold that the question is the same in this Court as it was in the District Court."

Conflict of Decision Between Ninth Circuit and Decisions of Other Circuit Courts of Appeal.

We submit that the decision in this case is in conflict with *Governor Clinton, Inc. v. Knott, et al.,* ..... Fed. (2d) 149 C. C. A. 2, 1941).

After the Filing of a Petition in Bankruptcy, Including a Debtor's Petition Under Chapter XI of the Bankruptcy Act, the Person and Property of the Bankrupt or Debtor, Wherever Located, Is Within the Exclusive Jurisdiction of the Bankruptcy Court—in Custodia Legis—and Cannot be Removed or Alienated Without the Approval and Authority of the Court.

It is not necessary to look further than the Bankruptcy Act for the basis of the above statement. Applicable sections are as follows:

> "Sec. 311. Where not inconsistent with the provisions of this chapter, the court in which the petition is filed, shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

> "Sec. 312. Where not inconsistent with the provisions of this chapter, the jurisdiction, powers, and duties of the Court shall be the same . . . (2) where a petition is filed under Section 322 of this act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed."

These sections were all discussed and applied in the recent decision of *Weiss v. Fleetwood Bank*, 26 N. Y. S. (2d) 583 (1941), in which case, in 1939 the debtor corporation filed a petition under Chapter XI of the Bankruptcy Act and was permitted to continue in possession of its business. The defendant bank knew of this proceeding. After the filing of the petition, one Birnbaum, the chief officer of the debtor corporation, cashed five certified checks payable to the debtor on his endorsement "Murray

E. Birnbaum, Trustee." Further checks were drawn on the debtor's bank account. All money so obtained was used by Birnbaum for his own purposes. In the above action the trustee in bankruptcy sought to recover from the bank on the theory of conversion. It was urged that since the bank knew of the proceeding it had notice that Birnbaum was not trustee, and that all funds taken from the debtor's account were in *custodia legis* and could be removed only with approval of the court. In holding that the trustee might recover the funds wrongfully secured by Birnbaum, the Court made the following statements:

> "Under the act, the debtor is permitted to remain in possession and to conduct the business, but the title of the debtor is the title of a trustee. Section 342 . . . so here, the business and its assets, after the filing of the petition for an 'arrangement,' were not the property of the debtor, but were a trust fund under the control of the court."

Under former Section 75 of the Bankruptcy Act the same problem arose concerning the debtor in possession of physical properties in *Price v. Louisana Rural R. Corporation,* 38 Fed. Supp. 196 (D. C., W. D. of La., 1941). Here a debtor filed a petition in 1933 under Section 75 of the Bankruptcy Act. In 1936, while his estate was still in the process of administration, he leased a part of the real property for two years. The debtor then sought to enforce the lease. The defense was that the lease was void since the property was in *custodia legis* and the debtor had no power to contract regarding property of his estate during the course of its administration under a debtor

proceeding. In holding that the defense was valid, the Court made the following statement:

> "Price sought the power of the court then to protect him in his property (by debtor proceedings), and it follows that he should have known that he could not sell for a period of years as in a lease without the knowledge and authority of the conciliation commissioner and the court. This requirement is to assure that the proceeds of all transactions will be delivered to and placed in the custody of the court. The property, as is so aptly said in the decision, was in *custodia legis* (page 199) . . . There was a total want of legal capacity in Mr. Price to contract. The lease contract was void *ab initio.*" (Page 200.) (Statements in parenthesis added.)

Likewise the debtor herein was totally without capacity to contract to pay for services of respondent for procuring a divorce and that contract is absolutely void. If the debtor's contract for the payment of the $10,000.00 divorce fee was valid it could have been enforced against his earnings and this proceeding rendered ineffectual. If it could not have been so enforced then it is invalid and void.

The Court, in *McKesson & Robbins v. Morris Travis Drug Co.*, 106 Fed. (2d) 681 (C. C. A. 6th, 1939), was called upon to make a direct statement regarding the custody of property of the bankrupt after the filing of the petition in bankruptcy. Plaintiff filed an involuntary petition in bankruptcy against the defendant. There was pending at the same time a state court proceeding in which a receiver had possession of the property of the alleged

bankrupt. The jurisdiction of the Bankruptcy Court was thereupon attacked. In upholding the jurisdiction of the Bankruptcy Court it was stated at page 683, as follows:

> "The material question is, whether an act of bankruptcy was committed by the drug company, and if so, the estate is regarded as in *custodia legis* from the filing of the petition regardless of actual custody."

During the Course of Administration of the Estate of a Debtor, Such Debtor May Make No Contract Regarding the Property Being Administered by the Court—Any Effort to do so Is Void Ab Initio.

Returning to the decision in *Price v. Louisiana Rural R. Corporation,* 38 Fed. Supp. 196 (D. C., W. D., La., 1941), we find, in addition to the prior statement that the contract was void *ab initio,* the following:

> "There have been decades of use of the Federal statutes of bankruptcy, and all laymen with any degree of business experience, not to mention lawyers, well know that the last person who might exercise disposition over property placed in the custody of the federal court through bankruptcy is the debtor himself." (Page 200.)

In *Biggs v. Moors,* 63 Fed. (2d) 70 (C. C. A. 7th, Wis.), we find a limitation on the power of the bankrupt to pay an attorney's fee. The bankrupt earned certain money prior to filing his petition in bankruptcy. He did not receive it, however, until after his petition was filed. After the petition was filed, he assigned it to his

attorneys in payment for fees in the bankruptcy proceeding. The trustee moved for an order requiring the attorneys to turn over all fees so received to the bankrupt estate. In so ordering, the Court, at page 71 said.

> "the salary came into the hands of the bankrupt and his attorneys after the filing of the petition in bankruptcy. It should have been turned over to the trustee, and the attorneys should have filed their petition to have their fees fixed. Their position that, having seized the money, the trustee should be required to file a petition to test the reasonableness of their fees is not tenable."

In the Matter of Bergman, 25 Fed. Supp. 694 (D. C., E. D., N. Y., 1938), the Court held that a debtor in possession could not even employ a fifteen dollar a week assistant in her business without approval and authority of the Court. Regarding the item sought to be used as a credit the Court said:

> ". . . it represents a payment to the bankrupt's son and as she was not authorized by any order of the court or referee to make this disbursement, no reason appears why it should be allowed."

Applying this rule of law, how could the debtor herein incur obligations to pay $100.00 per week and also $10,000.00 without, not alone the approval of the Court, but even its knowledge or the knowledge of the beneficiaries of the trust estate, to-wit, the creditors?

V.

Conclusion.

In conclusion, we again urge this Court to take over this case by a writ of certiorari, in that, (a) it is important that this Court determine whether an adjudication in bankruptcy after the failure of an arrangement under Chapter XI will vest all of the subsequent earnings back into the debtor's hands, even though the same have been received by a Receiver under conditions which are for the benefit of the debtor; (b) the action of the lower courts, which are in conflict with the decision of the Circuit Court of Appeals in the case of *Governor Clinton, Inc. v. Knott;* and, (c) this Court should determine whether Section 378 of the Bankruptcy Act divests the Bankruptcy Court of jurisdiction over property that has already come into its possession.

We submit that if the writ is granted, the ultimate decision should reverse the decision of the Circuit Court of Appeals for the Ninth Circuit and the decision of the District Court of the United States for the Southern District of California.

Dated at Los Angeles, California, this 31st day of May, 1944.

BERTRAM H. ROSS,
B. E. AHLPORT, and
EARL E. MOSS,

By EARL E. MOSS,
Counsel for Petitioner.